United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

77-6002

[CORRECTED COPY]
[March 17, 1977]

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 77-6002

COMMODITY FUTURES TRADING COMMISSION,

Plaintiff-Appellant,

v.

BRITISH AMERICAN COMMODITY OPTIONS CORP.,

Defendant-Appellee.

On Appeal from the United States District Court
for the Southern District of New York

BRIEF OF THE COMMODITY FUTURES TRADING COMMISSION, APPELLANT

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BRIEF OF THE COMMODITY FUTURES TRADING COMMISSION, APPELLANT

STATEMENT OF THE ISSUE PRESENTED

In an enforcement action brought by the Commodity Futures Trading Commission under Section 6c of the Commodity Exchange Act, may a district court properly exercise discretion to deny a preliminary injunction where (a) the Commission makes a strong prima facie showing that the defendant is presently engaged in ongoing violations of registration provisions of the Act and (b) there is a virtual certainty that the violations will continue?

PRELIMINARY STATEMENT

This is an appeal by the plaintiff, Commodity Futures Trading Commission, from a memorandum opinion and order entered by the United States District Court for the Southern District of New York (per Gagliardi, J.) on October 20, 1976 (JA173),[1/] in an enforcement action brought by the Commission pursuant to Section 6c of the Commodity Exchange Act, as amended, 7 U.S.C. §13a-1 (Supp. V, 1975). In that ruling the district court denied the Commission's motion for an order preliminarily enjoining defendant British American Commodity Options Corp. from continuing to violate the commodity-trading-advisor registration requirements of Section 4m of the Act, 7 U.S.C. §6m (Supp. V, 1975), and directed a "verdict" in British American's favor.[2/]

The Commission's complaint alleges (JA3) that British American has been acting as a commodity trading advisor as that term is defined in Section 2(a)(1) of the Act, 7 U.S.C. §2 (Supp. V, 1975), but, in violation of Section 4m of the Act, has not been registered with the Commission as a commodity trading advisor. Specifically, the complaint charges (JA2-3) that British American has been promoting, recommending and selling options on commodity futures contracts to members of the public since October 1975. It is further alleged that, in the course of these activities, British American has been engaged in the business of advising customers, either directly or through publications or writings, as to the value of commodities, and, as part of its regular business, has also been issuing analyses or reports concerning commodities.

1/ "JA___" refers to pages of the joint appendix filed with the Court. The Commission's exhibits are cited as "PX___".

2/ The district court's decision is reported at CCH Comm. Fut. L. Rep. ¶20,224.

British American applied for registration as a commodity trading advisor in March 1976. On April 16, 1976, however, the Commission instituted administrative proceedings to determine whether British American was unfit to be registered as a commodity trading advisor. As a result, in accordance with Section 8a(2) of the Act, 7 U.S.C. 12a(2) (Supp. V, 1975), registration has not been granted (JA3).

Following institution of this action on July 22, 1976, British American moved the district court to dismiss the complaint for lack of jurisdiction and for failure to state a claim upon which relief could be granted. Relying upon a "primary jurisdiction" theory, British American argued that the district court could not consider whether to enjoin British American from acting as a commodity trading advisor until after a final determination had been made in the administrative proceeding concerning British American's fitness to be registered. This argument was rejected and British American's motion was denied. In an oral opinion issued from the bench on October 6, 1976, the district court recognized (JA190) that "until British American is registered it is prohibited by the Act from doing business as a commodity trading advisor." It ruled (JA191):

> "If it is in the public interest to stop British American from doing business, CFTC need not wait, while the unregistered defendant makes unauthorized transactions, until the administrative hearing is complete. As such, on the face of its complaint, the CFTC has stated a cause of action."

That same day an evidentiary hearing was held on the Commission's motion for preliminary injunction. At that hearing the Commission offered testimony of eight witnesses and tendered exhibits, which showed that British American, although unregistered, had been giving advice over the telephone to customers and potential customers

as to the value of commodities for which options were being offered. It also showed that explanatory brochures had been mailed to customers and potential customers containing reports and analyses concerning commodities and offering advice as to the value of commodities (infra, pp. 14-17). Upon the conclusion of the Commission's case, British American moved for a "directed verdict" pursuant to Rule 50 of the Federal Rules of Civil Procedure.

On the evidence adduced the district court found British American to be a commodity trading advisor (JA177). The court also recognized that under Section 4m of the Act British American was required to register with the Commission in order to do business (JA177-178).

Nevertheless, the district court ruled that a "proper showing" had not been made to warrant entry of a preliminary injunction. Stating that "the issuance of an injunction is always subject to the principles of equitable discretion" (JA175-176), the court held that it was entitled to balance what it perceived to be the public interest against the private interest of British American (JA178-182).

While the district court seemingly recognized the existence of a continuing violation of the Act's registration requirements (JA178-180), it observed that the Commission had offered no proof that British American had been defrauding or misleading its customers or the general public. On this basis it concluded that there would be no apparent harm to the public interest if British American should be allowed to continue to conduct its business (JA183). The court stated (id.) that to enjoin British American from continuing to give commodity trading

advice until a final determination in the administrative proceeding would be "too harsh a result" in view of the adverse effect upon the business reputation and "legitimate" business activities of British American, as well as upon its employees and customers. Consequently, the district court "in its discretion" denied the Commission's motion for a preliminary injunction. This appeal followed.

STATEMENT OF THE CASE

The Registration Requirements for Commodity Trading Advisors

On October 23, 1974, Congress enacted the Commodity Futures Trading Commission Act of 1974, 88 Stat. 1389, et seq., which extensively amended the Commodity Exchange Act and established the Commission as an independent regulatory agency to administer and enforce that Act's provisions. Prior to the 1974 amendments, the Commodity Exchange Act had been administered by the Commodity Exchange Authority of the Department of Agriculture, and had applied only to trading in certain specifically enumerated agricultural commodities. See 7 U.S.C. §2 (1970). The 1974 amendments greatly expanded the coverage of the Act to encompass virtually all previously unregulated commodities and vested in the Commission "exclusive jurisdiction" to regulate "accounts, agreements (including any transaction which is of the character of, or is commonly known to the trade as, an 'option' . . .), and transactions involving contracts of sale of a commodity for future delivery . . . ."[3/]

The Commission's primary responsibility relates to contracts of sale of commodities for future delivery traded or executed on boards of trade--i.e., commodity exchanges. All futures transactions must be

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3/ Section 2(a)(1) of the Act, 7 U.S.C. §2 (Supp. V, 1975).

accomplished by or through a member of a board of trade that has been designated by the Commission as a "contract market" for the specific commodity futures contract involved. Section 4 of the Act, 7 U.S.C. §6 (Supp. V, 1975).[4/] In addition, certain persons who participate in the futures markets or other commodity-related activities must register with the Commission.

Prior to April 21, 1975--the effective date of the 1974 amendments--the Commodity Exchange Act provided for registration and regulation of only futures commission merchants and floor brokers.[5/] When

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4/ A "board of trade" is defined in Section 2(a)(1) of the Commodity Exchange Act, 7 U.S.C. §2, as

> "any exchange or association, whether incorporated or unincorporated, of persons who shall be engaged in the buying or selling of any commodity or receiving the same for sale on consignment."

In order to obtain designation as a contract market for a particular commodity futures contract, a board of trade must meet rigid requirements, see Section 5 of the Act, 7 U.S.C. §7 (Supp. V, 1975), and must continue, after designation, to maintain specific standards. See Section 5a of the Act, 7 U.S.C. §7a.

5/ A "futures commission merchant" is defined in Section 2(a)(1) of the Act as an individual or entity

> "engaged in soliciting or in accepting orders for the purchase or sale of any commodity for future delivery on or subject to the rules of any contract market and that, in or in connection with such solicitation or acceptance of orders, accepts any money, securities, or property (or extends credit in lieu thereof) to margin, guarantee, or secure any trades or contracts that result or may result therefrom."

A "floor broker" is defined in Section 2(a)(1) as a person

> "who, in or surrounding any 'pit', 'ring', 'post', or other place provided by a contract market for

(footnote continued)

Congress amended the Act in 1974, however, it brought within the statutory scheme of regulation additional categories of persons whose activities were found to have a material effect upon commodity futures trading but who had not theretofore been required to register. Among the newly regulated persons are "commodity trading advisors," who are defined in Section 2(a)(1) of the Act to include:

> "any person who, for compensation or profit, engages in the business of advising others, either directly or through publications or writings, as to the value of commodities or as to the advisability of trading in any commodity for future delivery on or subject to the rules of any contract market, or who for compensation or profit, and as part of a regular business, issues or promulgates analyses or reports concerning commodities . . . ." 6/

Congress expressly declared the activities of commodity trading advisors to be

> "affected with a national public interest in that . . . their advice, counsel, publications, writings, analyses and reports customarily relate

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5/ (footnote continued)

> the meeting of persons similarly engaged, shall purchase or sell for any other person any commodity for future delivery on or subject to the rules of any contract market."

6/ Section 2(a)(1) of the Act excludes from the definition:

> "(i) any bank or trust company, (ii) any newspaper reporter, newspaper columnist, newspaper editor, lawyer, accountant, or teacher, (iii) any floor broker or futures commission merchant, (iv) the publisher of any bona fide newspaper, news magazine, or business or financial publication of general and regular circulation including their employees, (v) any contract market, and (vi) such other persons not within the intent of this definition as the Commission may specify by rule, regulation, or order: Provided, That the furnishing of such services by the foregoing persons is solely incidental to the conduct of their business or profession."

> to and their operations are directed toward and cause the purchase and sale of commodities for future delivery on or subject to the rules of contract markets and . . . the foregoing transactions occur in such volume as to effect substantially transactions on contract markets."

Section 4l, 7 U.S.C. §6l (Supp. V, 1975). Thus, pursuant to Section 4m, 7 U.S.C. §6m (Supp. V, 1975), Congress has now made it generally unlawful for any commodity trading advisor, "unless registered . . . , to make use of the mails or any means or instrumentality of interstate commerce, in connection with his business as such . . ." (emphasis added). The Act also imposes upon commodity trading advisors various recordkeeping, reporting, disclosure and other regulatory requirements. See Sections 4n(4) and 4o, 7 U.S.C. §§6n(4) and 6o (Supp. V, 1975).

Registration as a commodity trading advisor may be sought by filing an application with the Commission in accordance with Section 4n(1) of the Act, 7 U.S.C. §6n(1). Thereafter, under Section 4n(2), 7 U.S.C. §6n(2), registration will ordinarily become "effective thirty days after the receipt of such application by the Commission . . . ."

However, in order to assure that unsuitable persons may not lawfully act as commodity trading advisors, Section 4n(7), 7 U.S.C. §6n(7), authorizes the Commission "after hearing" to deny registration to any person upon a finding that such denial is "in the public interest" and that the applicant or any officer, director or controlling person has engaged in certain disqualifying conduct or is subject to a specified enumerated disability. In addition, Section 8a(2), as amended, 7 U.S.C. §12a(2) permits the Commission, among other things, to refuse to register a person as a commodity trading advisor if, after opportunity for hearing,

the applicant is found unfit to engage in the activity for which registration is sought. That section expressly provides that until the Commission makes a final determination as to the applicant's fitness, "registration shall not be granted . . . ."

Relevant to the case at bar (see n. 12, infra, and accompanying text), one of the express grounds upon which registration may be denied under Section 4n(7) is that the commodity trading advisor, or any officer, director or controlling person thereof "is permanently . . . enjoined by order, judgment or decree of any court . . . from engaging in or continuing any conduct or practice . . . in connection with the purchase or sale of . . . securities . . . ." Section 4n(7)(B)(ii), 7 U.S.C. §6n(7)(B)(ii).[7/] Under Section 8a(2) the Commission is authorized to

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7/ Section 4n(7) provides in pertinent part:

> "The Commission after hearing may by order deny registration . . . of any commodity trading advisor . . . if the Commission finds that such denial . . . is in the public interest and that--
>
> . . .
>
> (B) such commodity trading advisor . . . or any partner, officer, director, person performing similar function or controlling person thereof--
>
> . . .
>
> (ii) at the time of issuance of such order, is permanently or temporarily enjoined by order, judgment or decree of any court of competent jurisdiction from acting as a commodity trading advisor, commodity pool operator, futures commission merchant, or floor broker, or as an affiliated person or employee or any of the foregoing, or from engaging in or continuing any conduct or practice in connection with the purchase or sale of commodities or securities . . . ."

refuse registration to an applicant for unfitness, among other things, "because such applicant . . . at any time engaged in any practice of the character prohibited by this Act . . . or . . . for other good cause shown . . . ." 8/ On July 3, 1975, the Commission published a release interpreting "good cause" to include for this purpose, inter alia, any instance in which a commodity trading advisor, or officer, director, controlling person, or holder of more than 10 per centum of the stock thereof

> "[a]t the time of the application, is permanently or temporarily enjoined by order, judgment or decree of any court . . . , or by agreement or settlement to which . . . the Securities and Exchange Commission is a party from acting as a . . . securities broker, securities dealer, investment advisor, or as an affiliated person

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8/ Section 8a of the Act, 7 U.S.C. §12a (Supp. V, 1975), provides in pertinent part:

> "The Commission is authorized--
>
> (1) to register . . . commodity trading advisors . . . upon application in accordance with rules and regulations and in form and manner to be prescribed by the Commission; and
>
> (2) to refuse to register any person--
>
> . . .
>
> (B) if it is found, after opportunity for hearing, that the applicant is unfit to engage in the business for which the application for registration is made, (i) because such applicant . . . at any time engaged in any practice of the character prohibited by this Act . . . or (ii) for other good cause shown . . . .
>
> Provided, That pending final determination under clause (B) . . . registration shall not be granted . . . ."

> or employee of any of the foregoing, or from engaging in or continuing any conduct or practice in connection with any such activity or involving any transaction or advice concerning . . . securities . . . ."

40 Fed. Reg. 28125, 28126.[9/]

British American's Continuing Violations of the Commodity Trading Advisor Registration Provisions

The essentially-undisputed evidence adduced on the Commission's motion for preliminary injunction established the following material facts:

British American, a New York corporation with offices in New York City and Miami, Florida, was organized in October 1975. It immediately commenced to engage in the public offer and sale of so-called "London commodity options"[10/] through nationwide telephone solicitations and various brochures and pamphlets mailed to prospective customers (JA4,34-45). Notwithstanding the requirements of the Commodity Exchange Act, British American began operations without first applying to the Commission for registration as a commodity trading advisor and thereafter continued to engage in business without serious concern whether the nature of its business activities required that it register as a commodity trading advisor under the Commodity Exchange Act (JA18, 21).

9/ The Commission stated that the interpretation of "good cause" in the release was not exclusive and that "there may be other instances for which the Commission, after opportunity for hearing, may determine to deny registration. . . ." Id.

10/ A commodity option gives the purchaser, upon payment of the premium therefore, the right, during a specified period of time, to buy ("call") and/or sell ("put") at a set "striking price" a specific futures contract or, in the case of an option on an actual commodity, a specific quantity of that commodity. So-called "London options" of the type offered by British American relate to futures contracts on commodities traded on the London commodity markets. British American Commodity Options Corp. v. Bagley, CCH Comm. Fut. L. Rep. ¶21,245 at p. 21,326 and n. 2 (S.D.N.Y. 1976), appeal pending, 2d Cir. No. 77-6010.

After British American's activities came to the attention of the Commission, members of the Commission's staff orally advised British American on March 3, 1976, that in their view British American was a commodity trading advisor as defined in the Act and, accordingly, that it could not lawfully continue to offer commodity advice unless and until registered with the Commission (JA52). Only then did British American, on March 18, 1976, file a registration application.[11/] However, British American disclaimed Commission jurisdiction over it (JA52, 62) and continued to give commodity trading advice to its option customers (JA25-33).

On April 16, 1976--within thirty days following the filing of British American's application--the Commission instituted proceedings, pursuant to Sections 4n(7) and 8a(2) of the Act, (supra, nn. 7-8) to determine whether British American was unfit to be registered as a commodity trading advisor (JA17).[12/] In accordance with the express

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11/ After the registration application had been returned to British American because of the omission of certain biographical information (JA68-69), it was subsequently re-submitted to the Commission on March 25, 1976 (JA7).

12/ The Complaint and Notice of Hearing (JA20-21) set forth allegations that, in connection with the offer and sale of commodity options, British American had been cheating and defrauding customers and prospective customers, and had been making false and deceptive statements to them in violation of Section 4c(b) of the Act, 7 U.S.C. §6c(b), and Commission Rule 30.01 thereunder, 17 C.F.R. §30.01 (1976).

It was also alleged (JA18-19) that John Forma--an officer, director and sole shareholder of British American--was the subject of two permanent injunctions entered by the United States District Court for the Southern District of New York on April 30, 1970, and May 8, 1973, respectively, enjoining him from future violations of the books and records and net capital provisions of the Securities Exchange Act of 1934 and applicable

(footnote continued)

requirement in Section 8a(2), supra, n. 8, the Commission notified British American in its complaint that registration would not be granted pending a final determination in the proceeding (JA22).

With respect to British American's business activities, the evidence in the record below demonstrated--and the court below found--that British American, in soliciting option customers, had been giving advice on commodities and providing analyses and reports concerning commodities, that it had done so over the telephone and in brochures mailed to prospective customers, and that it had received compensation

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12/ (footnote continued)

SEC regulations. The injunctions had been entered upon Mr. Forma's consent without his having admitted or denied the violations alleged in the complaints. See Securities and Exchange Commission v. Forma, S.D.N.Y., 70 Civ. 1743; Securities and Exchange Commission v. Forma Securities, Inc., S.D.N.Y. 73 Civ. 643. (PX 1).

The administrative complaint further charged (JA18) that on April 28, 1975, Mr. Forma had also been barred by the Securities and Exchange Commission from associating with any securities broker, dealer, registered investment company or registered investment adviser. Mr. Forma had consented to the issuance of that order without admitting or denying the allegations in that agency's administrative complaint that Mr. Forma had willfully violated and aided and abetted violations of anti-fraud, books and records, and net capital provisions of the federal securities laws. (PX 1).

After the complaint was answered, the administrative proceeding against British American was referred to an Administrative Law Judge for hearing and initial decision. As a result of a series of pre-hearing motions by British American and a number of extensions and postponements requested by the firm, the administrative hearing was originally scheduled to begin on October 8, 1976 (JA52), but was thereafter rescheduled, at British American's request, to begin on November 15. The hearings commenced on that date and continued through the end of that month and into December. At the present time the parties are preparing post-hearing findings and conclusions for submission to the Administrative Law Judge.

through the sale of options to its customers. As we show below, the evidence demonstrated that British American had conducted its business in that manner between October 1975, when it commenced operation, and the time when it filed its application for registration in March 1976. The evidence further demonstrated that British American thereafter continued to offer advice, analyses and reports concerning commodities at least until October 6, 1976, the date of the evidentiary hearing before the district court on the Commission's motion for preliminary injunction.

Four former salesmen of British American, who had been asspciated with the firm during the period from March 1976 to August 2, 1976, testified that, in contacting prospective option customers by telephone, they had expressed views concerning the commodity underlying the option being offered, including coffee, copper, sugar, rubber, lead and zinc (JA14, 134-35, 142, 150). In recommending the purchase of a particular commodity option, they had advised potential customers whether the market price of the commodity could be expected to increase and the reasons why an increase might be expected based upon existing conditions. For example, one of the salesmen stated (JA142-143) that he explained to prospective customers

> "that there was a risk involved but the anticipation was in the field that coffee would be going up in price because of the conditions in Brazil and the coffee-producing countries; that their crop was lower, especially in Brazil because of the frost which had destroyed about 75 percent of their coffee last year."

Three of these witnesses also testified that they had mailed promotional brochures and pamphlets prepared by British American to prospective customers (JA136, 144, 150). It was further explained

(JA116) that the purchase price charged for an option sold by British American covered the option premium British American would be required to pay, commissions to compensate salesmen for services rendered, all operating expenses, including those expenses incurred by British American's research department in developing and preparing advisory brochures, as well as British American's profit.

Advisory and promotional brochures and pamphlets prepared by British American, which accompanied British American's submission to the Commission of its registration application, concern commodities such as rubber, coffee and sugar, and advise the reader that the purchase of an option with respect to these commodities would provide a substantial return because of anticipated price movements due to market conditions. In this regard one British American publication introduced into evidence by the Commission discussed rubber (JA38):

" - - RUBBER - -

RUBBER ON ROAD TO RECOVERY?

WE AT BRITISH AMERICAN BELIEVE SO!"

After a two paragraph analysis of the importance of rubber to the automotive industry, British American gave its "Conclusion and Opinion":

> "In light of the above our research department suggests that rubber be bought for all medium to long term aggressive portfolios." Id.

In a second publication (JA40), British American pointed to

> "*WAR IN ANGOLA!
> *FLOODS IN COLUMBIA!
> *RECENT FREEZE IN BRAZIL
> WILL COFFEE GO HIGHER???
> WORLD OPINION?
> *PROBABLY.
> OUR OPINION?
> *YES!
> IS IT MOVING UP NOW?
> *YES!!
> TIMING IS EVERYTHING--
> CALL US NOW."

In yet another publication, British American advised that "sugar prices will move higher," citing such influences as a decline in production due to flood damage to Columbian cane, Brazilian weather, war in Angola and a poor Russian sugar beet harvest. From the charted estimates, it appears that British American predicted a sugar price rise from 15 cents per pound in December 1975 to 21 cents per pound in January 1976, over a one-third increase in a month's time. (JA39.)

Laurence Lese, a Maryland resident employed as an attorney by the Securities and Exchange Commission, was called as a Commission witness. He had been solicited to purchase commodity options in January and March of 1976 by two different salespersons of British American. In these conversations Mr. Lese was variously told that he could "double or triple" his investment by purchasing options and that a return as high as $60,000 could be obtained through the purchase of sugar options at a price of $3,700. As to the latter, Mr. Lese testified that the salesman "emphasized how much money I could make, how the market was going up, how he believed Russia and China were holding back on sugar production and on their exports, and all that leads to a higher sugar price, and therefore my investment would get to be $60,000." (JA98-101, 108-109.)

In September and October 1976, Maryann Chiacchere and Bernard Prince, two Commission employees, called at the offices of British American and, posing as prospective customers, inquired about the purchase of options. In this way they sought to ascertain whether British American was still giving commodity advice to others at that time. A British American salesman recommended to Ms. Chiacchere the purchase of a September 1977 coffee option costing $3,500 because he "felt that the

price of coffee would rise from its present price of about $1.38 per pound to about $2.50 to $3.00 per pound" since "Brazil had decided to stop exporting coffee and Columbia had already" (JA81). He also informed Ms. Chiacchere that for every penny the price of coffee increased, an investment would make $110, explaining that commissions on the sale were included in the $3,500 cost of the option (JA79-80). Similarly, the salesman suggested that Mr. Prince buy coffee and sugar options, stating that he was recommending coffee and sugar "[b]ecause he had expected some government interference on the part of both coffee and sugar and thought that the price would rise" (JA90).

At the hearing on the Commission's motion for preliminary injunction, counsel for British American conceded that British American was giving advice concerning commodities in connection with offer and sale of commodity options to members of the public (JA102-103). He attempted to show only that British American did not separately charge their customers for the advice they were given, although the cost of that advice was plainly included in the monies received from a customer's purchase of a commodity option (JA130-131, 140-141, 147, 152).

ARGUMENT

WHERE THE COMMISSION HAS MADE A STRONG PRIMA FACIE SHOWING THAT A DEFENDANT IS PRESENTLY ENGAGED IN ONGOING VIOLATIONS OF REGISTRATION PROVISIONS OF THE COMMODITY EXCHANGE ACT AND THAT IT IS VIRTUALLY CERTAIN THAT THE VIOLATIONS WILL CONTINUE, A DISTRICT COURT MAY NOT EXERCISE DISCRETION TO DENY A PRELIMINARY INJUNCTION IN AN ACTION BROUGHT BY THE COMMISSION UNDER SECTION 6c OF THE ACT.

Pursuant to Section 6c of the Commodity Exchange Act, the Commission is authorized to institute an action in federal district court to enjoin violations of any provision of the Act. That section further provides that "upon a proper showing" the district court "shall issue a temporary or permanent injunction . . . ."

It has long been recognized that in an action brought to enforce the requirements of statutes such as the Commodity Exchange Act,[13/] the standards governing the issuance of an injunction for the protection of the public are necessarily broad and are free from more restrictive concepts that may properly be applied in private litigation. Thus, the Supreme Court has recognized that in an enforcement action brought by a government agency

> "[t]he discretion . . . [of the courts] must be exercised in light of the large objective of the Act. For the standards of public interest, not the requirements of private litigation, measure the propriety and need for injunctive relief in these cases."

13/ Savage v. Commodity Futures Trading Commission, CCH Comm. Fut. L. Rep. ¶20,256 at p. 21,369 (7th Cir., 1977); Commodity Futures Trading Commission v. J.S. Love and Associates Options, Ltd., CCH Comm. Fut. L. Rep. ¶20,198 at 21,105 (S.D. N.Y., 1966); cf., Superintendent of Insurance v. Bankers Life & Casualty Co., 404 U.S. 6 (1971); Securities and Exchange Commission v. Capital Gains Research Bureau, 375 U.S. 180 (1963).

Hecht Co. v. Bowles, 321 U.S. 321, 331 (1944).[14/] As the Court of Appeals for the Fifth Circuit explained in Mitchell v. Pidcock, 290 F. 2d 281, 287 (1962):

> ". . . this proceeding [an enforcement action under the Fair Labor Standards Act] is only superficially related to a suit in equity for an injunction to protect interests jeopardized in a private controversy. The public interest is jeopardized here. The injunctive processes are a means of effecting general compliance with national policy as expressed by Congress, a public policy judges too must carry out--actuated by the spirit of the law and not begrudgingly as if it were a newly imposed fiat of a presidium."

That court continued (id., emphasis in original):

> "We do not say or imply that injunctions should be issued freely, without regard for the facts, simply because it is the Government asking for the injunction. We say that the manifest difficulty of the Government's inspecting, investigating, and litigating every complaint of a violation weighs heavily in favor of enforcement by injunction--after the court has found an unquestionable violation of the Act."

For these reasons, this Court and other courts have consistently ruled that an agency responsible for the enforcement of federal statutes is not required to make a specific showing of injury or of the inadequacy of other remedies in order to obtain injunctive relief--although these are matters that a private party seeking to vindicate purely private rights would have to prove. Rather, since enforcement actions are "creatures of statute," it is sufficient that the statutory conditions

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14/ See Virginia Ry. Co. v. System Federal No. 40, Etc., 300 U.S. 515, 552 (1927); Securities and Exchange Commission v. Manor Nursing Centers, Inc., 458 F.2d 1082 (2nd Cir., 1972); United States v. Diapulse Corp. of America, 457 F.2d 25, 28-29 (2d Cir. 1972); Securities and Exchange Commission v. Culpepper, 270 F.2d 241, 249 (2d Cir., 1959).

for the grant of injunctive relief have been satisfied. E.g., Securities and Exchange Commission v. Management Dynamics, Inc., 515 F.2d 801, 808 (2d Cir., 1975);[15/] Commodity Futures Trading Commission v. J. S. Love and Associates Options, Ltd., supra, CCH Comm. Fut. L. Rep. ¶20,198 at p. 20,107.[16/]

15/ As the court below observed (JA175-176) the provisions of Section 6c of the Commodity Exchange Act are substantially the same as those contained in Section 21(e) of the Securities Exchange Act of 1934, 15 U.S.C. 78u(e), and Section 20(b) of the Securities Act of 1933, 15 U.S.C. 77t(b). Indeed, the legislative history of the 1974 amendments to the Commodity Exchange Act indicates a deliberate Congressional desire to confer upon this Commission broad enforcement powers with respect to commodities trading activities that would be analogous to those possessed by the Securities and Exchange Commission. See 120 Cong. Rec. S18865 (Oct. 10, 1974); Hearings before the Senate Committee on Agriculture and Forestry on S. 2485, S. 2578, S. 2837, and H.R. 13113, 93d Cong., 2d Sess., pt. 1, at 202-203, pt. 3 at 685-686, 718-721, 736, 745 (1974). See generally S. Rep. No. 93-1131, 93d Cong., 2d Sess. 24-25 (1974). Thus, the decisions of this Court and other courts, which have described the circumstances in which the Securities and Exchange Commission may obtain an injunction under the securities laws are particularly pertinent to the case at bar. See Commodity Futures Trading Commission v. J. S. Love & Associates Options, Ltd., supra, CCH Comm. Fut. L. Rep. ¶20,198 at p. 21,107. Cf., Savage v. Commodity Futures Trading Commission, supra, CCH Comm. Fut. L. Rep. ¶20,256 at p. 21,369.

16/ Accord, e.g., Securities and Exchange Commission v. First American Bank & Trust Co., 481 F.2d 673, 682 (8th Cir., 1973); Securities and Exchange Commission v. Boren, 283 F.2d 312, 313 (2d Cir., 1960); Securities and Exchange Commission v. Culpepper, 270 F.2d 241, 249 (2d Cir., 1959); Securities and Exchange Commission v. Torr, 87 F.2d 446, 450 (2d Cir., 1937); Securities and Exchange Commission v. Globus Int'l, Ltd., 320 F. Supp. 158, 160 (S.D.N.Y. 1970); Securities and Exchange Commission v. Shattuck Denn Mining Corp., 297 F. Supp. 470, 472 (S.D.N.Y. 1968); Securities and Exchange Commission v. Broadwall Securities, Inc., 240 F. Supp. 962, 967 (S.D.N.Y. 1965); Securities and Exchange Commission v. General Securities Co., 216 F. Supp. 350, 352 (S.D.N.Y. 1963); Securities and Exchange Commission v. Mono-Kearsarge Consol. Mining Co., 167 F. Supp. 248, 261 (D. Utah 1958).

In this regard it has been repeatedly held that the enforcement agency has made the requisite "proper showing" for entry of a preliminary injunction if it has presented a prima facie case that the defendant has engaged, or is engaging, in illegal conduct[17/] and demonstrates a "reasonable likelihood" of future violations on the part of the defendant.[18/] A reasonable expectation of future violations may be inferred by a district court merely from the fact of past violations, Securities and Exchange Commission v. Management Dynamics, Inc., supra, 515 F.2d at 807-808,[19/] even when the defendant has ceased its illegal activities prior to the institution of an action against it.

17/ E.g., Securities and Exchange Commission v. Management Dynamics, Inc., supra, 515 F.2d at 807; Securities and Exchange Commission v. Boren, supra, 283 F.2d 312; Securities and Exchange Commission v. S & P National Corp., 360 F.2d 741 (2d Cir., 1966); accord, Securities and Exchange Commission v. First American Bank & Trust Co., supra, 481 F.2d at 682; Federal Trade Commission v. Rhodes Pharmacal Co., 191 F.2d 744, 747 (7th Cir., 1951); Bowles v. Montgomery-Ward Co., Inc., 143 F.2d 38, 42 (7th Cir., 1944); Commodity Futures Trading Commission v. J. S. Love and Associates Options, Ltd., supra; Securities and Exchange Commission v. Bennett & Co., 207 F. Supp. 919, 923 (D.N.J. 1962).

18/ E.g., Securities and Exchange Commission v. Management Dynamics, Inc., supra, 515 F.2d at 807-808; Securities and Exchange Commission v. Shapiro, 494 F.2d 1031, 1308 (2d Cir., 1974); Securities and Exchange Commission v. First American Bank, supra, 481 F.2d at 682; Securities and Exchange Commission v. Manor Nursing Centers, Inc., supra, 458 F.2d at 1100; United States v. Diapulse Corp. of America, supra, 457 F.2d at 28-29; Securities and Exchange Commission v. Texas Gulf Sulphur Co., 446 F.2d 1301, 1306, (2d Cir.), cert. denied, 404 U.S. 1005 (1971); Securities and Exchange Commission v. Culpepper, supra, 270 F.2d at 249-250; Securities and Exchange Commission v.MacElvain, 417 F.2d 1134, 1137 (5th Cir., 1969), cert. denied, 397 U.S. 972 (1970); Securities and Exchange Commission v. Keller Corp., 323 F.2d 397, 402 (7th Cir., 1963).

19/ See cases cited note 18, supra.

Securities and Exchange Commission v. Keller Corp., supra 323 F. 2d at 402.[20] And this inference has been held to be significantly strengthened where the defendant has not ceased its unlawful conduct until after the institution of an injunction action. United States v. Park Davis & Co., 362 U.S. 29, 48 (1960).[21]

Here, the Commission established a strong prima facie case that British American had continuously violated the registration provisions of Section 4m of the Act since October 1975, that it did so notwithstanding an awareness of applicable requirements since at least March 3, 1976, and that British American was presently engaging in such violations at the time of the hearing on the motion for preliminary injunction. British American was giving advice and issuing reports and analyses concerning commodities in promoting and offering options to members of the public; it received compensation and profit upon the sale of options for which advice was rendered; it was engaging in that business activity by use of the telephone and the mails; and it was not at any time registered as a commodity trading advisor (see pp. 13-17, supra). Consequently, as the district court found (JA177-178), each of the elements of a violation of Section 4m were proven: British American is a commodity trading advisor,

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20/ Securities and Exchange Commission v. Management Dynamics, Inc., supra, 515 F.2d at 807-808; United States v. Article of Drug, etc., 362 F.2d 63, 73-74 (2d Cir., 1970); Securities and Exchange Commission v. Culpepper, supra, 270 F.2d at 241.

21/ See also Wirtz v. Atlas Roofing Mfg. Co., 377 F.2d 112, 116-117 (5th Cir., 1967); Securities and Exchange Commission v. Boren, supra, 283 F.2d at 313; Securities and Exchange Commission v. Culpepper, supra, 270 F.2d at 250.

it has been using the mails and other instrumentalities of interstate commerce to engage in that business activity and it has not complied with the registration requirement. 22/

The evidence at bar compels the conclusion that repetition of British American's unlawful activity is a virtual certainty. British

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22/ British American's defenses were that the commodity advice it admittedly renders is merely incidental to its business as a purveyor of options and that it does not receive compensation or profit directly or exclusively for the substantial advice it gives. British American claimed that Congress did not intend the definition of commodity trading advisor to apply to persons who give advice incidental to the sale of options. But, while it is true that Section 2(a)(1) excludes from the statutory definition certain classes of persons who render advice incidental to a particular business activity (see n. 6, supra), commodity option dealers are not among the classes enumerated. Nor does Senate Report No. 93-1131, 93d Cong., 2d Sess. 24 (1974), upon which British American relied, support the interpretation British American has advanced. In the report the Senate Committee stated (emphasis added) that

> ". . . many individuals who are engaged in the buying and selling of commodities may, in the course of their arms-length transactions with customers, offer opinions on the value of commodities or commodity futures which are entirely gratuitous. Any such incidental expression of views does not bring either an employee or his employer within the definition of 'commodity trading advisor.'"

The opinions given by British American are hardly gratuitous, since British American can hope to profit only if their trading advice is taken and results in commodity option transactions for which commissions will be received. Moreover, the comments of the Senate Committee relate only to transactions in actual commodities, not commodity options. This is no small distinction. The Commission's authority over transactions in actual commodities and the persons who deal in actual commodities is quite limited when compared to its pervasive authority with respect to commodity futures contracts and commodity

(footnote continued)

American has been acting as a commodity trading advisor without registration for more than a year and has been adamant in its refusal to cease its unlawful conduct. Even if it were assumed, arguendo, that British American's violations had initially been the result of a misapprehension of its legal duty, in March 1976 the Commission's staff brought to its attention that it was required to register and in April the Commission instituted administrative proceedings to determine British American's fitness to be registered. In view of these facts, British American's determination to continue to offer trading advice in connection with its ongoing option activities plainly constituted a deliberate and intentional flouting of the will of Congress.

In these circumstances, the district court could not properly exercise discretion to deny injunctive relief. The Supreme Court has made clear that, although a district court has broad latitude in fashioning equitable remedies, a decree is subject to reversal if, in the

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22/ (Footnote continued)

options and the persons who deal in those interests. Those persons who deal in commodity futures and incidentally offer commodity trading advice are excluded from the statutory definition of commodity trading advisor only if they are registered with the Commission in some other professional capacity. See exceptions numbered (iii) and (v) set forth in n. 6, supra. Needless to say, British American is not registered with the Commission in any other relevant capacity.

Nor does the language of Section 2(a)(1) require, expressly or implicitly, that a person obtain compensation or profit directly or exclusively for giving commodity advice in order to be a commodity trading advisor.

exercise of its discretion, the court does not "effectively redress proved violations" of law. United States v. E. I. duPont de Nemours & Co., 366 U.S. 316, 323, 326 (1960). In duPont, the Court held that where, as in the case at bar, the Government has established the existence of continuing violations of statutory provisions, a district court may not refuse to grant whatever relief is necessary to assure cessation of the illegal activity.

Similarly, in Walling v. Panther Creek Mines, 148 F.2d 604 (7th Cir. 1948), the court of appeals reversed the denial of an injunction under the Fair Labor Standards Act. The court recognized (id. at 605) that "granting an injunction under . . . the Act lies within the trial court's discretion . . . ." It held, however, that

> "where the evidence clearly shows existing violations and the likelihood, indeed, the virtual certainty, of future violations, a decision denying an injunction will be reversed. . . .[T]his is not a case where the alleged unlawful practices have been abandoned, and compliance effected, with the promise they will not be resumed. On the contrary, the challenged practices are continuing . . . ."[23/]

Id. at 605 (emphasis added).

Consistent with these principles, the district court in United States v. William R. Mandell Co., 242 F. Supp. 873 (E.D. Pa. 1965) granted injunctive relief when faced with facts substantially identical to those presented in the case at bar. There, the United States brought an action under the Perishable Commodities Act to enjoin a vegetable broker

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23/ See also McComb v. LaCosa Del Transporte, Inc., 167 F.2d 209 (1st Cir., 1948); cf., Albermarle Paper Co. v. Moody, 422 U.S. 405, 416 (1974), Regional Rail Reorganization Act Cases, 419 U.S. 102 (1974); Mitchell v. DeMario Jewelry, 361 U.S. 288 (1960); Henry v. Greenville Airport Comm'n., 284 F. 2d 631, 633 (4th Cir., 1960).

from operating without a license. The broker had filed an application with the Department of Agriculture but proceedings had thereafter been instituted to determine whether the license should be denied. While the proceeding was still pending, the broker had continued to operate without the license. Emphasizing that "the infractions continue here as certain as night follows day," the court recognized that if, during the administrative and appeals process, "injunctions were not issued because of the possibility of error at the administrative level, the injunction provision would become a nullity in terms of meaningful law enforcement."

Nevertheless, the court below concluded (JA181) that the "mere" continuation of British American's business while administrative denial proceedings were pending before the Commission was "not the necessary repetition of a wrong to grant an injunction." The court asserted that it was entitled to balance its perception of the public interest against the supposedly harmful effect of an injunction on the private interest of British American. And it held (JA182) that, in order to satisfy the "proper showing" requirement in Section 6c, it was necessary for the Commission to demonstrate, in addition to the fact of a continuing violation, that "harm to the public interest" would result if British American were not prohibited from doing business--and to do so through evidence that "a wrong connected with fraud or misconduct . . . is to be repeated."

But this Court has already expressly rejected the view that an enforcement agency must separately show injury to the public interest

after it has already established a virtual certainty of future violations of the statute it has been entrusted to enforce. In Securities and Exchange Commission v. Management Dynamics, Inc., supra, 515 F. 2d at 806, the defendants had contended that "preliminary injunctions cannot be granted at the SEC's behest unless a district court finds irreparable injury or a balance of equities which favors the Commission," id. at 808. While this Court recognized a district court's traditional authority to assess considerations of fairness when deciding whether to grant injunctive relief, it held that ". . . the statutory imprimatur given SEC enforcement proceedings is sufficient to obviate the need for a finding of irreparable injury at least where the statutory prerequisite--the likelihood of future violation of the securities laws--has been clearly demonstrated," id. This Court explained (id. at 808-809, emphasis added):

> "[T]he SEC appears in these proceedings not as an ordinary litigant, but as a statutory guardian charged with safeguarding the public interest in enforcing the securities laws. . . . To a large extent, then, a finding that future violations are likely to occur implies that a significant injury to the public has been shown . . . .[I]nsofar as it is urged that a greater showing of irreparable injury is required if the defendant's actions are to be enjoined, we believe the effective enforcement of the securities laws would be jeopardized if that principle were adopted."

Consistent with this Court's reasoning in Management Dynamics, Section 4m of the Commodity Exchange Act must be recognized to reflect a Congressional judgment that it is contrary to the public interest for a firm to act as a commodity trading advisor without prior Commission

scrutiny of its fitness to do so and without a determination by the Commission that to permit the applicant to act in this capacity of sensitive public trust would not subject the public to an unwarranted risk. See Savage v. Commodity Futures Trading Commission, supra, CCH Comm. Fut. L. Rep. ¶20,256 at p. 21,369. By imposing a different standard of public interest, which permits vindication of the Congressional purpose only by a showing of fraud or mistreatment of British American's customers, the district court effectively undermined the statute. By refusing to grant injunctive relief on the basis Congress has prescribed, the district court sanctioned the further exposure of public investors to the possible depredations of a firm whose fitness to be a commodity trading advisor has been questioned but has not yet been decided. This was patently in error. As the court stated in Lenroot v. Interstate Bakeries Corp., 146 F.2d 325, 328 (8th Cir. 1945):

> "[The] Act does not leave the appraisal of the public interest . . . to either personal or judicial opinion. That which the Act declares to be unlawful is against the public policy and is injurious to the public interest . . . ."

To be sure, this Court recognized in Management Dynamics that where "the fact of violation and the likelihood of future infractions" are not so clearly demonstrated, a district court may appropriately consider "traditional equitable principles in arriving at its conclusion" whether to issue an injunction. 515 F.2d at 809, n. 5. But this is not such a case. Here, the Commission has unambiguously

demonstrated that the illegal conduct of British American is continuing and will surely be repeated in the absence of a restraint. Accordingly, the district court was not entitled to attach any substantial weight to traditional equitable considerations which might otherwise properly affect its equitable judgment.

In any event, even if the court below had been entitled to balance the public interest against the private interests of British American, it clearly applied erroneous legal standards and considered inappropriate factors when it purported to do so. The district court particularly emphasized (JA183) that British American's "legitimate" business activities would be irreparably injured if it were enjoined from further violations of the Act pending a final determination in the administrative proceeding. The district court found it significant that British American had built up a business with approximately 100 employees, one million dollars in net worth, and close to 2,000 customers (JA182-183). Thus, it weighed the benefits British American has derived from success in the offer and sale of options as militating against the grant of an injunction.

But, contrary to the district court's assumption, British American has not been engaged in a "legitimate" business operation. British American has violated the law on each day since October 1975

that it has rendered commodity trading advice to its option customers. Its business has thrived on unrestrained illegal activity, and it presents a constant threat to the public of further violations of law. Contrary to the apparent view of the district court, the present substantial size of the firm measures the degree of that threat to the public, and militates in favor of an injunction, not against one. Moreover, the net worth of British American, which so impressed the court below, reflects nothing less than an aggregate of unlawful profits to which the customers of British American may well be entitled if they should seek to rescind option transactions that were unlawfully induced or seek to recover damages they have sustained.

Thus, the district court's decision tends to insulate from injunction those violators of the law who have had the most substantial adverse impact upon the public, giving favorable consideration to facts evidencing the most persistent and the most successful of unlawful activities. Under the reasoning of the court below, the statutory injunctive remedy would remain available to be applied only against those firms too small to claim substantial hardship and whose operations are capable of inflicting the least injury.

In analogous circumstances, other courts have specifically rejected such an approach.[24/] As the Seventh Circuit held, in

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24/ See, e.g., Wirtz v. Malthor, Inc., 391 F.2d 1 (1st Cir. 1968); Fortuna Broom Co. v. Wirtz, 379 F.2d 327 (5th Cir. 1967); Walling v. National Ice and Fuel Corp., 167 F.2d 209 (1st Cir., 1948); Walling v. Panther Creek Mines, 148 F.2d 604, 605 (7th Cir., 1945); United States v. Mandell, 242 F. Supp. 873 (E.D. Pa. 1965).

refusing to stay a preliminary injunction pending appeal, which enjoined the defendants from disseminating false advertisements:

> ". . . The injunction will interrupt defendant's business for the period of its continuance. On the other hand, if the injunction be lifted until the appeal can be heard on the merits, the defendants will have extracted several millions of dollars from the more than 330,000 prospective buyers . . . . [D]efendants' losses through interference (or destruction) of their business is not of such a character as to invite preventive orders by a court of equity who has no duty, irrespective of the Federal Trade Act, to protect illegitimate profits or advance business which is conducted by unfair business methods . . . ."

Federal Trade Commission v. Thomsen-King & Co., 109 F.2d 516, 519 (2d Cir. 1940). These cases are in accord with the views of the Supreme Court that "[t]hose who violate the Act may not reap the benefits of their violations and avoid an undoing of their unlawful project on the plea of hardship or inconvenience." E.g., United States v. Crescent Amusement Co., 323 U.S. 173, 185 (1944), cited with approval in duPont, supra, 366 U.S. at 327.

The district court also misapprehended the effect of an injunction in the instant case. Although the Commission sought preliminarily to enjoin British American from giving commodity advice without registration, it does not follow from this, as the district court apparently assumed (JA183), that British American would be restrained from doing business. So long as the firm refrained from issuing analyses and reports concerning commodities and from advising customers as to the value of commodities, it could offer and sell options without contravening the requested decree. Nor would it in any way be disabled from closing out previously existing option positions for its customers.

The court below seems also to have attributed significance to the fact that the Commission did not institute the present action until July 1976 even though (the court assumed) the Commission had learned, in October 1975, that British American had started doing business and, in April 1976, had instituted proceedings to deny British American's registration (JA178). Even if the Commission had been aware of that fact and had consciously refrained from acting at that time, however, there is no basis in law upon which the Commission may somehow be estopped from obtaining otherwise appropriate relief to vindicate the public interest. As was stated in Pan-American Petroleum Transport Co. v. United States, 273 U.S. 456,506 (1927), general principles of equity "will not be applied [against the United States] to frustrate the purpose of its laws or to thwart public policy." Even "neglect of duty on the part of officers of the Government is no defense to a suit by it to enforce a public right or protect a public interest." Utah Power & Light Co. v. United States, 243 U.S. 389, 409 (1917). Accord, Securitites and Exchange Commission v. Culpepper, supra, 270 F. 2d at 248; Mines & Metals Corp. v. Securities and Exchange Commission, 200 F. 2d 317, 320-321 (9th Cir.), cert. denied, 345 U.S. 941 (1953).

Thus, it was not incumbent upon the Commission, as the district court implied (JA187, n. 12), to seek out and beseech British American to register as a commodity trading advisor. The burden to comply with the law was and is upon British American. That burden cannot be shifted to the Commission or its staff. Accordingly, the Commission's failure earlier to warn British American that its activities were unlawful, or to take action more promptly than it did to prevent British American's violations, provides British American with no exemption from its statutory obligation and provides no basis upon which a court may properly deny injunctive relief. See Capital Funds, Inc. v. Securities and Exchange Commission, 348 F. 2d 582 (8th Cir., 1965); Securities and Exchange Commission v. Culpepper, supra, 270 F. 2d at 248; Securities and Exchange Commission v. Morgan, Lewis & Bockius, 209 F. 2d 44, 49 (3rd Cir., 1953).

Finally, the court below attached substantial weight (JA180-181) to what it apparently viewed as a deficiency in the Commission's July 1975 release, interpreting "good cause" for denial of registration under Section 8a(2)(B) of the Act, supra n. 8--specifically, the failure of the Commission to alert British American to the risk that it might not gain the benefit of registration after 30 days, by operation of law, if an administrative proceeding should be commenced to refuse it registration on the basis of outstanding SEC consent decrees against its sole shareholder (see pp. 10-11, supra).

But there is no probative evidence that British American's determination to commence operations and subsequently to apply for registration was made in reliance upon the Commission's release or even that British American was aware of that release at any relevant time.

Moreover, it is entirely irrelevant whether the Commission's release failed to provide notice to British American that its registration would not automatically become effective. Under the mandatory requirement of Section 8a(2) of the Act registration may not be granted pending final decision of a proceeding instituted under clause (B) of that section. The administrative proceeding against British American was instituted to determine, among other things, whether British American had been violating antifraud provisions of the Commodity Exchange Act in connection with the sale of commodity options (see n. 12, supra)--a basis upon which the Commission could refuse registration under Section 8a(2)(B)(i) of the Act. In these circumstances there could not have been any reasonable expectation on the part of British American that its application for registration would become automatically effective after the expiration of 30 days.

In any event, it has long been recognized that where a statute provides for registration to become effective by operation of law at the expiration of a specified period, the institution of proceedings challenging the propriety of registration before the expiration of that period will suspend effectiveness of the

registration until such time as the proceedings have been resolved. Thus, in Jones v. Securities and Exchange Commission, 298 U.S. 1 (1936), the Supreme Court considered the relevant implications of Section 8 of the Securities Act of 1933, 15 U.S.C. 77h--which provides that a registration statement for the offering of securities shall become effective within 20 days after the filing of the statement with the SEC (Section 8a, 15 U.S.C. 77h(a)), but empowers the SEC, after notice and hearing, to issue an order stopping effectiveness of the registration statement where certain deficiencies are found (Section 8d, 15 U.S.C. 77h(d)). The Supreme Court held, id. at 18:

> "When proceedings . . . [are] instituted by the commission and the . . . [issuer of a security is] notified and called upon to show cause why a stop order should not be issued, the practical effect . . . [is] to suspend, pending the inquiry, all action of the . . . [issuer] under his statement. Unless the registration statement is effective, the issuer of a security who makes use of the mails or of the instrumentalities of interstate commerce to sell the security or to carry the same for the purposes of sale or delivery after sale, §5(a) of the act, is liable to severe penalties of fine and imprisonment. §24. The word 'effective,' as here employed, connotes completeness of operative force and freedom to act. And a registration statement which, while still in fieri, is brought under official challenge in respect of its validity and subjected to an official proceeding aimed at its destruction, cannot be so characterized until the challenge is determined in favor of the . . . [issuer]. In the meantime, since he can act only at his peril, the registration statement can in no real sense be called effective."

Likewise, while a Commission proceeding challenging British American's fitness for registration is pending, registration is not effective and would not be effective even in the absence of the express

provision to that effect in Section 8a(2). Thus British American at all times has acted at its peril and, under those circumstances, the Commission was clearly entitled to an injunction to restrain further violations of law by that firm.

CONCLUSION

For the foregoing reasons, the decision of the district court should be reversed and the case remanded for further proceedings consistent with the controlling authorities discussed above.

Respectfully submitted,

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March 1977

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OFFICE OF
THE GENERAL COUNSEL

March 17, 1977

A. Daniel Fusaro, Esquire
Clerk, United States Court of Appeals
for the Second Circuit
United States Courthouse
Foley Square
New York, New York 10007

Re: Commodity Futures Trading Commission v. British American Commodity Options Corp., No. 77-6002 (C.A. 2).

Dear Mr. Fusaro:

In reviewing the brief filed by the Commission in the above-referenced case on March 10, 1977, we discovered several typographical errors, one of which affects a clear understanding of a statement made in the Commission's brief. Specifically at page 17, line 14, the word "We" should be changed to "He". Thus, the pertinent sentence should read as follows:

> "He attempted to show only that British American did not separately charge their customers for the advice they were given, although the cost of that advice was plainly included in the monies received from a customer's purchase of a commodity option (JA130-131, 140-141, 147, 152)."

In addition, we wish to bring to the Court's attention the following corrections:

p. 9, line 1: the first word should be "the applicant";

p. 18, note 13, line 3: after J. S. Love insert "and Associates Options, Ltd.";

p. 19, note 14, line 6: remove "n" to read (2d. Cir.;

p. 20, line 4: after J. S. Love insert "and Associates Options, Ltd.";

p. 21, note 17, line 9: after J. S. Love insert "and Associates Options, Ltd.";

p. 25, line 11: after the word "at" insert page number "605";

p. 25, line 23: Pa should be Pa.;

p. 30, line 16: change "reasoniung" to "reasoning";

p. 31, second line after the quote: insert "2d Cir." before 1940.

For the Court's convenience, we are enclosing for filing in the above-referenced case ten corrected copies of the Commission's brief, which we request be substituted for the briefs earlier filed.

I hereby certify that on March 17, 1977, I caused to be served by United States mail, first class, postage pre-paid, a copy of this letter and two copies of the Commission's corrected brief upon counsel for appellee as follows:

Charles J. Hecht, Esq.
60 East 42nd Street
New York, New York 10017

Very truly yours,

Virginia F. Crisman

Virginia F. Crisman
Attorney

Enclosures